E COP

FILED
SEP 11 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-243

CLEAN AIR COORDINATING COMMITTEE,
Petitioner,

vs.

ROTH ADAM FUEL COMPANY, CHICAGO COAL MERCHANTS ASSOCIATION, ILLINOIS POLLUTION CONTROL BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

HARRY A. YOUNG, JR.,
ALLEN C. ENGERMAN,
ROBERT J. LIFTON,
33 North La Salle Street,
Chicago, Illinois,
Attorneys for Respondents Roth Adam Fuel Company and Chicago Coal Merchants Association.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	2
Argument:	
I. The Decision of the Court of Appeals is not in Conflict With Decisions of Other Circuits, With State Law, or With the Decisions of This Court	4
II. The Decision of the Court of Appeals was Correct and Does not Require Review by This Court	8
Conclusion	10

CITATIONS.

Cases.

Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng., 398 U. S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970)	9
Machesky v. Bizzell, 414 F. 2d 283 (5 Cir. 1969)	5
Mitchum v. Foster, ... U. S. ....., 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)	6, 7, 8
Studebaker Corporation v. Gittlin, 360 F. 2d 692 (2 Cir. 1966)	5

Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., 418 F. 2d 387 (5 Cir. 1969), cert. den. 397 U. S. 910 (1970), reh. den. 397 U. S. 1030 (1970) 6

United States v. Barrett, 442 F. 2d 642 (4 Cir. 1971). 5

United States v. Louisiana, 265 F. Supp. 703 (E. D. La. 1966) 5

Younger v. Harris, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) 7

Statutes.

28 U. S. C. § 1331 9

28 U. S. C. § 1337 9

28 U. S. C. § 2283 .....5, 6, 8, 9

42 U. S. C. § 1857(a)(3) 8

42 U. S. C. § 1857c-2(a) 8

42 U. S. C. § 1857c-5(c) 7

Miscellaneous.

U. S. Sup. Ct. Rule 19, 28 U. S. C. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-243.

CLEAN AIR COORDINATING COMMITTEE,
Petitioner,

vs.

ROTH ADAM FUEL COMPANY, CHICAGO COAL MERCHANTS ASSOCIATION, ILLINOIS POLLUTION CONTROL BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

This is the brief of Respondents Roth Adam Fuel Company and Chicago Coal Merchants Association in opposition to the petition for a writ of certiorari filed herein. Respondent Illinois Pollution Control Board has not actively participated in the proceedings below, and it is not anticipated that said Respondent will participate in these proceedings.

OPINIONS BELOW.

The ruling of the United States District Court for the Northern District of Illinois, Eastern Division has not been officially reported. The substance of said ruling is set forth

on page 3 of Petitioner's appendix. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported, but appears in Petitioner's appendix.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Does the Federal Clean Air Act contain an "express authorization" within the meaning of 28 U. S. C. § 2283 which would permit a United States District Court, at the instance of a private party, to enjoin proceedings in a state court?

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are adequately set forth in the petition.

STATEMENT OF THE CASE.

This is an action by an unincorporated association filed in a United States District Court seeking to enjoin the enforcement of a preliminary injunction issued on April 27, 1972 by the Circuit Court of Cook County, Illinois against the Illinois Pollution Control Board, an agency of the State of Illinois. The state court injunction, which is presently on appeal in the Illinois Appellate Court, temporarily enjoins said state agency from adopting a certain state regulation issued pursuant to a state statute relating to particulate emissions.

In the proceedings in the Circuit Court of Cook County, Illinois, entitled *Roth Adam Fuel Company, et al* v. *Illinois Pollution Control Board, et al.*, No. 72 CH 1484, which action

petitioner seeks to enjoin, respondents challenged a proposed rule of the Illinois Pollution Control Board which would limit the emission of particulate matter from existing solid fuel combustion sources located in the Chicago Major Metropolitan Area. The effect of this rule, as admitted by the Illinois Pollution Control Board and as found by the Circuit Court of Cook County, Illinois, would be a total ban on the use of coal for residential and commercial space heating purposes in the Chicago Major Metropolitan Area. After an evidentiary hearing in the Circuit Court of Cook County, Illinois, that court (Hon. Nathan M. Cohen, Judge Presiding) entered on April 27, 1972, an order granting a preliminary injunction restraining and enjoining the Illinois Pollution Control Board from adopting the subject rule or any other rule which has a similar effect. On April 28, 1972, a notice of interlocutory appeal was filed by the Illinois Pollution Control Board which is also a respondent in this case. Accordingly, the state court proceedings are now pending on appeal to the Illinois Appellate Court.

The action pending in the state courts of Illinois does not attack or seek to invalidate any federal statute, or any rule or regulation of any federal agency, or any action of any federal agency, but is concerned solely with statutes and regulations of the State of Illinois and of the agencies of the State of Illinois. Neither the United States nor any Federal agency is a party to the state court proceedings.

During the pendency of the state court proceedings, petitioner commenced the present action in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to enjoin the enforcement of the state court injunction. The relevant facts relating to the action in the district court are fully stated in the opinion of the United States Court of Appeals for the Seventh Circuit, which appears in the appendix to the petition herein. Briefly stated, the court of appeals refused to grant peti-

tioner's motion for a preliminary injunction and remanded the case to the district court with directions to dismiss the action, on the grounds that the federal anti-injunction statute, 28 U. S. C. § 2283 precluded the federal courts from enjoining the state court proceedings.

The United States Environmental Protection Agency, which had originally been named as a party defendant by petitioner, was dismissed at its request as a party defendant while the action was pending in the district court, and has taken no active part in these proceedings. The Illinois Pollution Control Board, the principal defendant in the state court proceedings and also a respondent in these proceedings, has not actively participated in these proceedings.

On or about July 27, 1972, the United States Environmental Agency, pursuant to 42 U. S. C., § 1857c-5(c), proposed as a substitute for the state rule which the Illinois Pollution Control Board was enjoined from adopting, a federal regulation which will regulate particulate emissions from residential and solid fuel combustion sources in the Chicago area by regulating the ash content of (rather that particulate emissions from) solid fuels which may be sold or used. Hearings on said proposed federal rule commenced in Chicago, Illinois on August 31, 1972. When and if adopted said federal regulation will, by operation of federal law, supercede Illinois law and regulations.

ARGUMENT.

I.

The Decision of the Court of Appeals Is Not in Conflict with Decisions of Other Circuits, with State Law, or with Decisions of This Court.

The court of appeals in the present case has held that there is no express authorization in the Federal Clean Air Act, 42 U. S. C. § 1857 et seq., which would permit a

private party to invoke the jurisdiction of the federal courts to enjoin proceedings pending in a state court, and that petitioner's action is accordingly barred by 28 U. S. C. § 2283. This decision is not in conflict with decisions of other circuits.

Petitioner has cited *Studebaker Corporation* v. *Gittlin*, 360 F. 2d 692 (2d Cir. 1966) and *Machesky* v. *Bizzell*, 414 F. 2d 283 (5th Cir. 1969) as authority for the proposition that a private party is free from the prohibitions of 28 U. S. C. § 2283 where such party is attempting to enforce a "superior federal interest." *Studebaker Corporation* v. *Gittlin*, 360 F. 2d 692 (2d Cir. 1966), involved an action by a private party for the enforcement of rights under the Securities Exchange Act, which action was a necessary supplement to action by the Securities Exchange Commission. The present case is not a supplement to action by any federal agency, and involves no potential or present activities of interest to the United States or any of its agencies. The United States Environmental Protection Agency, which was originally named as a party-defendant, was dismissed from this action with prejudice, and has not seen fit to intervene as a party-plaintiff.

In *Machesky* v. *Bizzell*, 414 F. 2d 283 (5th Cir. 1969) a private party was allowed to maintain an action in the federal courts to enjoin state court proceedings in order to protect constitutionally favored First Amendment rights. No such rights are involved in the present case.

In *United States* v. *Barrett*, 442 F. 2d 642 (4th Cir. 1971) and *United States* v. *Louisiana*, 265 F. Supp. 703 (E. D. La. 1966) cited by petitioner, both actions were commenced by the United States to enforce federally protected rights. Petitioner in the present case is a private party and neither the United States nor any federal agency has seen fit to intervene in this action to protect any "superior federal interests."

Finally, in *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387 (5th Cir. 1969), cert. den. 397 U. S. 910 (1970), reh. den. 397 U. S. 1030 (1970), the court held that the Interstate Commerce Act contained an express authorization for injunctive actions by private parties, which brought the plaintiff in that case within the exception to 28 U. S. C. § 2283. No such "express authorization" can be found in the Federal Clean Air Act. The decision of the Court of Appeals in the present case is accordingly not in conflict with the decisions of any other circuit.

In addition, the court of appeals in the present case has not decided an important state question in a way in conflict with applicable state law. No point of Illinois law entered into or was affected by the court of appeal's decision. The court of appeals merely applied a federal statute, 28 U. S. C. § 2883, to the facts of this case and refused to interfere with a proceeding pending in the courts of the State of Illinois.

Finally, the decision of the court of appeals in no way conflicts with any applicable decision of this Court. To the contrary, the court of appeals has correctly applied and followed the rule set forth in *Mitchum* v. *Foster*, ____ U. S. ____, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972), wherein this court stated at 92 S. Ct. 2155 that:

> "In short, if a[n] . . . action is not an "expressly authorized" statutory exception, the anti-injunction law absolutely prohibits in such an action all federal equitable intervention in a pending state court proceeding, whether civil or criminal, and regardless of how extraordinary the particular circumstances may be."

and further at 92 S. Ct. 2159-2160 that:

> "(I)t is clear that, in order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and

> uniquely federal right or remedy, enforceable in a federal court of equity, which could be frustrated if the federal court were not empowered to enjoin a state court proceeding."
>
> • • • • •
>
> "The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding."

Petitioner has yet to indicate wherein the Federal Clean Air Act "expressly authorizes" federal judicial intervention in pending state court proceedings, or wherein said act clearly creates a federal right or remedy enforceable in a federal court which can be effectuated only by a stay of state court proceedings.

In the present case, respondents have, in the state court proceedings which petitioner seeks to enjoin, sought review of *state* regulations of a *state* agency adopted pursuant to a *state* statute. Accordingly, the state court proceedings which petitioner seeks to enjoin do not interfere with any area of exclusive federal law. The United States Environmental Protection Agency is free to promulgate and adopt regulations for the State of Illinois pursuant to 42 U. S. C. § 1857c-5(c) and in fact has already commenced proceedings in this regard. Accordingly, a stay of the state court proceedings in the present case is not necessary to effectuate any federal right or remedy created by the Federal Clean Air Act. The decision of the court of appeals therefor is in accord with the applicable decisions of this court.

This court has, in its recent decisions, delt extensively with the subject of federal judicial intervention in state court proceedings. *Younger* v. *Harris,* 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971); *Mitchum* v. *Foster,* ____ U. S. ____, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972). Accordingly, none of the considerations governing review on certiorari

set forth in U. S. Sup. Ct. Rule 19 are present, and this case does not warrant or merit review by this court on certiorari.

II.

The Decision of the Court of Appeals Was Correct and Does Not Require Review by This Court.

The state court proceedings which petitioner seeks to enjoin present no challenge to any federal statute or regulation nor to the action of any federal agency, as said proceedings are directed against a regulation of a state agency adopted pursuant to a state statute. Neither the United States nor any federal agency are parties to or affected by the state court proceedings, nor have they indicated any interest in the present proceedings or taken any steps to protect any alleged "superior federal interests." Even the Illinois Pollution Control Board, the principal defendant in the state court proceedings and a nominal respondent in these proceedings, has taken no active interest in these proceedings.

The subject matter of this action, i.e. pollution control, does not rest exclusively in the federal courts. The Federal Clean Air Act contemplates the implementation and enforcement of pollution control programs by the several states. See 42 U. S. C. §§ 1857(a)(3), 1857c-2(a). Therefor, no exclusive federal jurisdiction over pollution control programs is created by the Federal Clean Air Act.

Accordingly, no "uniquely federal right or remedy" is being frustrated in the present case so as to justify a stay of state court proceedings by a federal court at the instance of a private party. As there is no express authorization in the Federal Clean Air Act which would permit such an invocation of federal jurisdiction, the Court of Appeals was correct in holding that 28 U. S. C. § 2283 is a complete bar to the maintenance of petitioner's action. *Mitchum* v. *Foster*,

___ U. S. ___, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972). Where there are any doubts as to the propriety of a federal injunction against a state court proceeding, such doubts should be resolved in favor of permitting state courts to proceed in any orderly fashion to finally determine the controversy. *Atlantic Coast Line R. Co.* v. *Brotherhood of Loc. Eng.*, 398 U. S. 281, 297, 90 S. Ct. 1739, 26 L. ed. 2d 234 (1970).

Since the Court of Appeals based its decision solely on 28 U. S. C. § 2283, the other arguments of the parties regarding the district court's jurisdiction were not considered. Respondents submit, however, that the court of appeals had ample reason to dismiss petitioner's action for lack of federal jurisdiction. No federal statute, federal regulation, or action of any federal agency, has been questioned or is involved in the state court proceedings. The district court therefor had no jurisdiction under 28 U. S. C. § 1331 (Federal question jurisdiction).

In regards to petitioner's claim that the district court had jurisdiction pursuant to 28 U. S. C. § 1337, while there is no doubt that Congress has validly exercised its power to regulate interstate commerce in enacting the Federal Clean Air Act, (which in part seeks to regulate the movement of pollutants across state lines) this does not, however, mean that a complaint "involving" the Federal Clean Air Act, which is filed by a private party, confers jurisdiction on a United States District Court under 28 U. S. C. § 1337. The present case is not a suit to abate pollution, nor has it been brought by the United States or any agency thereof. There is no provision in the Federal Clean Air Act which would serve to confer jurisdiction on a federal court pursuant to 28 U. S. C. § 1337 to entertain a suit by a private citizen to enjoin a state court proceeding.

The decision of the Court of Appeals was correct and in accord with the decisions of this court, and does not require review by this court.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

HARRY A. YOUNG, JR.,
ALLEN C. ENGERMAN,
ROBERT J. LIFTON,
33 North La Salle Street,
Chicago, Illinois,
Attorneys for Respondents Roth Adam Fuel Company and Chicago Coal Merchants Association.